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[*Hasan v. System Energy Resources, Inc.*](#), 89-ERA-36 (ALJ Aug. 2, 1989)

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U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 89-ERA-36

In the Matter of

SYED M.A. HASAN
Complainant

v.

SYSTEM ENERGY RESOURCES, INC.
Respondent

Michael D. Kohn, Esquire
Steven M. Kohn, Esquire
For the Complainant

Kenneth Milam, Esquire
Nicholas S. Reynolds, Esquire
Peter Dykema, Esquire
For the Respondent

BEFORE: STUART A. LEVIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (hereinafter referred to as the ERA) and the regulations promulgated and published at 29 CFR Part 24 to implement the Act. On April 11, 1989, Syed M.A. Hasan filed a complaint with the Department of Labor alleging that he was subjected to discrimination and improperly released from his job by System Energy Resources, Inc., (SERI) the owner and operator of the Grand Gulf Nuclear Station.

Following an investigation, the District Director, Employment Standards Administration, U.S. Department of Labor, advised Mr. Hasan that the allegations in his complaint could not be substantiated. On June 13, 1989, Hasan requested a formal hearing

[Page 2]

which convened in Washington, D.C. on June 22, 23, and July 6, 1989.¹

The findings and conclusions which follow are based upon my observations of the appearance and demeanor of the witnesses who testified at the hearing, and upon an analysis of the entire record in light of the arguments presented, the regulations, statutory provisions, and applicable case law.

Findings of Fact

1. Syed M.A. Hasan is a civil and structural engineer with nineteen years of experience working on nuclear power plants. (Tr. 43A). Since October 13, 1986, Hasan has been employed by the Bechtel Power Corporation, (Tr. 44A) and is currently employed by Bechtel at its Gaithersburg, Maryland, office. (Tr. 107-08A; 137A; 142A). He specializes in the design and review of nuclear power plant pipe supports and the ladders and platforms within such plants. (Tr. 44A; Tr. 41-42B; 72B, 80A).

2. The Bechtel Power Corporation designed and constructed the Grant Gulf Nuclear Station at Port Gibson, Mississippi. (Tr. 5B; 11B) System Energy Resources, Inc. (SERI) owns and operates the facility (Tr. 11B).

3. From time to time, at SERI's request, Bechtel will assign its personnel to work at Grand Gulf under the direction and supervision of SERI employees. These assignments are made pursuant to contracts between SERI and Bechtel which specify, among other terms, the duration of the assignment and the cost to SERI. SERI usually acquires contract help when workloads exceed the capacities of its in-house staff. (Tr. 10B).

The contracts which implement SERI's requests are referred to as Design Change/Engineering Assistance forms (DCA). (Tr. 45A; 15B, 121-123B; RX 1-5). SERI pays Bechtel directly for the services of the assigned employee.

4. Although the DCA's may identify the particular job duties SERI may anticipate assigning the Bechtel employee, SERI is, as a matter of custom in its dealings with Bechtel, free to vary those duties in accordance with its needs. (Tr. 122-23B; 67B). The employees thus assigned are known as "seconded" employees. (Tr. 112A. 8-12B). They are paid by Bechtel and remain covered

[Page 3]

by Bechtel insurance and retirement programs, (Tr. 93-95A; Tr. 57C) but they are nevertheless, while at Grand Gulf, subject to the full supervision of SERI management. (Tr. 45A, 113A; Tr. 8-10B; 13B; 100B, 130B).

5. Two types of "seconded" employees work at Grand Gulf, temporary, seconded and permanent, seconded personnel.

The term permanent, seconded employees refers to several Bechtel employees who were stationed at the Grand Gulf facility prior to the time SERI decided to build its own engineering organization and phase-out Bechtel. These individuals have historical knowledge of the facility, and provide SERI with the expertise and experience needed to train its staff. DCA's of 3 or 6 month duration are prepared for these permanent, seconded workers, and they are paid by Bechtel, but they receive no per diem expenses. (Tr. 11B, 91-92B; 57C). They have generally worked at Grand Gulf for more than two years. (Tr. 93B; 57C).

The term temporary, seconded employee refers to an individual who has been acquired on a contract basis from another firm to work on a specific project requiring special expertise or additional manpower. Unlike permanent, seconded employees, temporary, seconded workers are paid per diem for their living expenses while they work at Grand Gulf, and return to their permanent employer when SERI's needs are fulfilled. (Tr. 12B; 92-93B; 57C).

6. Syed Hasan, the complainant in this matter, was a temporary, seconded employee assigned by Bechtel to work at Grand Gulf commencing as of May 31, 1988. (Tr. 44A; 93A). Mr. Hasan was "seconded" to SERI, pursuant to a DCA of three months duration, for the purpose of designing the pipe supports of a new heat removal system SERI planned to install at Grand Gulf. (RX 2; Tr. 46A). The new system was known as the Alternate Decay Heat Removal System (ADHRS). (Tr. 46A, 223A; Tr. 12-13B). Along with Hasan, and in accordance with the DCA, Bechtel sent another engineer, Derick Hunter, to work on the ADHRS pipe support designs. (RX 2; Tr. 47A, 108-09A). Both Hunter and Hasan were supervised on this project by a SERI employee, Mr. Bob Gordon, who, in turn, reported to his SERI supervisor, Mr. Rabindra Dubey. (Tr. 13B).

7. By late August of 1988, the designs for the ADHRS pipe supports were nearly complete. Hasan and Hunter were planning

[Page 4]

to leave the Grand Gulf job site and return to Bechtel for further assignment. (Tr. 98A, 100A, 120A). On August 23, 1988, at a weekly staff meeting conducted by Dubey, the staff was advised that Hunter and Hasan had completed their assignment and would be departing. (Tr. 47A, 119A, 120A).

At the staff meeting on August 23, 1988, Hasan requested to meet with Dubey privately after the staff meeting, and Dubey agreed. (Tr. 52A, 119A). During his private visit with Dubey, Hasan advised Dubey that he was concerned about the methods which were being employed to calculate certain stresses on the ADHRS pipe supports.

At the time, Grand Gulf was using the CE-901 computer program for the design of its pipe supports. Hasan had noted that the computer program did not factor in warping torsion, and, as a result, he had concluded that manual computations were necessary to verify the fact that open sections of the pipe supports were sufficient for all loadings. In reviewing numerous engineering design packages for the ADHRS pipe supports, Hasan observed that only the packages he had calculated, and one other, had manual computations for warping torsion. All the rest simply relied upon the computer outputs. (Tr. 40A, 48-49A).

8. Meeting privately with Dubey on August 23, 1988, Hasan expressed his concern about the lack of warping torsion calculations in the pipe support packages. He advised Dubey that he had previously informed his supervisor, Bob Gordon, about the problem, and had discussed it with Nyan Deshpande, then an assistant to Dubey. (Tr. 52A). He handed Dubey a memorandum explaining his concern which concluded: "It is now for you to take up this matter with the higher authorities of SERI and determine whether it is a 'reportable item' to NRC." (CX 1; Tr. 50-52A).

According to Hasan, Dubey was very upset at this meeting and tore up the memorandum. (Tr. 52-53A). Dubey, in contrast, states that he read Hasan's memo, decided that torsional stresses should be considered in respect to the open section supports', and that he so advised his staff. Dubey contends that he discarded Hasan's memorandum without informing his superiors, because he thought that the matter was resolved to Hasan's satisfaction. (RX 10). Mr. Deshpande also was under the impression that Hasan's concerns about the warping torsion calculations had been resolved. (Tr. 70-71B).

[Page 5]

9. In late August or early September of 1988, SERI reorganized its engineering department. The pipe support group, which had previously been under the supervision of Dubey in the Mechanical Engineering Department, was transferred to the Civil Engineering Department, under Deshpande. (Tr. 113A; 6-9B; RX 10). Deshpande was aware of Hasan's concerns about warping torsion and had discussed the matter with Hasan before he became the supervisor of the pipe support group. (Tr. 52A).

10. Although Hasan expected to be leaving Grand Gulf in late August or early September at the conclusion of his temporary assignment designing the ADHRS pipe supports, (Tr. 120A) he was, shortly before his scheduled departure, but subsequent to the August 23, 1988 meeting with Dubey, asked to remain on site to assist in "scoping out" a project involving the design of platforms and ladders throughout the facility. (Tr. 47-48A;

121A; Tr. 27-28B, 96B, 121B; CX 9; CX 10; RX 1). This assignment was implemented by a DCA for a term of 640 hours commencing on September 6, 1988. (RX 1). The DCA specifically identified Hasan as the engineer SERI wanted to work on the ladders and platforms project. (RX 1; Tr. 17B).

Derick Hunter, the engineer who accompanied Hasan on the ADHRS pipe support assignment, unlike Hasan, was not extended and left Grand Gulf when the ADHRS assignment was completed. (Tr. 120A; Tr. 16B).

11. In November, 1988, while working on the ladders and platforms project, Hasan wrote to the Chairman of the Nuclear Regulatory Commission (NRC), regarding the warping torsion issue and attached a copy of the August 23, 1988, memo (CX 1) he had submitted to Dubey. (Tr. 55-56A, 62A, 64-65A; CX 3). Hasan sent the letter only to the Chairman of the NRC and his own counsel. He advised no one at SERI or Bechtel that he had raised the torsion issue with the NRC. (Tr. 141A, 150A).

12. Shortly after Hasan communicated with the Chairman of the NRC, SERI management was advised by the NRC that the ADHRS pipe supports would be audited. Mr. Dubey noted that the NRC would be auditing the same torsion issues Hasan had raised (Tr. 79-81A, 127A); and Deshpande, in December of 1988, took Hasan off the ladders and platforms project and assigned him to address the NRC's torsion concerns. (Tr. 72-74A). Deshpande regarded Hasan as the best qualified person to compute the extra

[Page 6]

stresses on the pipe supports and come up with corrective measures. (Tr. 42A, 74A, 78-80B).

13. In the course of reviewing pipe support packages in preparation for the NRC's torsion audit, Hasan noticed a different problem which related to pipe support stiffness. As Hasan explained it, the Grand Gulf design criteria required certain flexibilities (a reciprocal of stiffness) in order to qualify a particular pipe support. The pipe support packages he reviewed, however, had used an incorrect method of calculating stiffness. (Tr. 76A).

Hasan advised Deshpande of his findings, and was told "for the time being, you just concentrate only on detailed shear stress calculations." (Tr. 75A).

On or about December 11, 1988, Hasan communicated his concern about the stiffness calculations to the NRC. (Tr. 72A; CX 3). Hasan advised no one at SERI or Bechtel that he had communicated with the NRC regarding pipe support stiffness.

14. Hasan's temporary assignment on the ladders and platforms project came to an end on December 30, 1988, and he was scheduled to return to Bechtel. At Deshpande's

request, however, Hasan's assignment at Grand Gulf was extended until March 31, 1989. (RX 4; Tr. 18B, 100B, 130B).

The alternate decay heat removal system (ADHRS) Hasan had helped to design in the summer of 1988, was, by January of 1989, entering the construction phase. Deshpande noted that the construction phase often involved change notices which required the approval of the engineers, and, in his opinion, Hasan was the best qualified person to review change notice requests. (Tr. 18-19B; 130-31B). He, therefore, recommended that Hasan be kept on board at the Grand Gulf through March of 1989.

15. On January 4 and 5, 1989, the NRC visited Grand Gulf to audit the warping torsion calculations for the ADHRS pipe supports. Hasan was invited to attend the meeting by his supervisor, Mr. Deshpande. (Tr. 80A). Among those in attendance at the meeting were Hasan, Dr. Dubey, Bob Gordon, Joe Malara, and Deshpande, among others from SERI, and Mr. Lapinski and Mr. Kitner from the NRC. (Tr. 80A, 129A; 44B).

As a result of the meeting, the NRC indicated that it would

[Page 7]

not accept engineering judgment in respect to the torsion component of the pipe support calculations. The NRC required SERI to carry out manual calculations under circumstances involving shear stresses of small magnitude. (Tr. 43B-45B).

In response, SERI assigned several engineers, including Hasan, to document the shear stresses requested by the NRC. In addition, SERI prepared a desktop procedure for calculating torsional loads. (Tr. 45B; Tr. 150-51C, 160-61C, 168C.). SERI did not issue a separate DCA for Hasan's work in connection with the audit (Tr. 67B).

16. Following the audit in January of 1989, Hasan again wrote to the Chairman of the NRC. In addition to discussing the stiffness issue (*see*, finding 13 *infra*), Hasan expressed a concern that during the audit at Grand Gulf, NRC staff focused on shear stress calculations. Hasan noted that shear stress is only one component of the torsion problem, and that torsion also induces bending stresses. Consequently, the detailed shear stress calculations SERI was performing in response to the NRC audit would not, in Hasan's view, encompass the bending stresses, in part, induced by torsion. (Tr. 154-55B, 159B).

17. Sometime in February of 1989, SERI management was advised by the NRC that on March 20-23, 1989, an audit would be conducted involving, among other issues, pipe support stiffness calculations. (Tr. 180A; *See* CX 11). Hasan was informed of the audit by Deshpande, and Deshpande arranged to have Hasan meet with the NRC auditor. (Tr. 83-84A).

The decision to send Hasan to the meeting was made by Deshpande, (Tr. 185A), and Hasan met with the auditor in a private meeting. (Tr. 129-30A).

According to Hasan, following his meeting with the NRC auditor, Deshpande was angry with him, and commented that Hasan should be fired for raising the stiffness issue with the NRC. (Tr. 85A, 186-87A). Prior to his meeting with the NRC auditor, however, no one at SERI or Bechtel was aware of Hasan's letters to the NRC. (Tr. 187A-88A, 48B). Further, Hasan attended the meeting at Deshpande's request. Deshpande, therefore, denies that he said Hasan should be fired for discussing matters Deshpande reasonably expected the auditor to address in the meeting he asked Hasan to attend. (Tr. 48B).

[Page 8]

18. Hasan's assignment at Grand Gulf was scheduled to end on March 31, 1989. (*See*, Finding 14 *infra*). It was the responsibility of Al Matiuk, then a Chief Engineer for Bechtel, to obtain reassignments for "seconded" Bechtel engineers returning from various job sites. (Tr. 63C; 88-9C). In early March 1989, Hasan knew that his assignment at Grand Gulf was nearing completion, and he was in contact with Matiuk's office regarding his reassignment (RX 8).

19. The Grand Gulf Nuclear Station was, in ordinary course, scheduled to shutdown for a refueling outage in March and April, 1989. The outage was planned in advance, and was the subject of meetings between SERI and Bechtel management in respect to increased staffing requirements during the outage. (Tr 62C; 109C; 113C).

During an outage, areas of the plant, not otherwise accessible, can be inspected and maintained, and SERI's manpower requirements temporarily increase. In January and February of 1989, SERI management met to determine manpower needs during the outage which was scheduled to end on April 30, 1989. (Tr. 58-59B, 65B, 124-26B).

In accordance with SERI's manpower plan, Hasan was, in late March, 1989, asked to remain at Grand Gulf through the outage. He was, however, advised that he would be released on April 28, 1989, after the outage. (Tr. 130-33A; RX 5).

20. Upon learning that he would be released after the outage, Hasan approached Deshpande and made a special plea that he be permitted to stay at Grand Gulf for several weeks until the end of the school year. (Tr. 86A, 132A). Deshpande took Hasan's request to SERI management and the request was denied. (Tr. 61B, 64B, 126-27B, 133B).

21. On April 18, 1989, Hasan left Grand Gulf having obtained an early release which permitted him to commence a new assignment with Bechtel at its Gaithersburg, Maryland offices. (Tr. 44A; 107-08A; 62B).

22. At various times during each of his four assignments at SERI, Hasan perceived that SERI employees or others were "upset" over his concerns about warping torsion or stiffness calculations. (Tr. 53A, 72-75A, 77-78A, 82A, 85A, 150A, 187A). From time to time, he believed that co-workers or supervisors may have

[Page 9]

suspected him of initiating communications with the NRC or "whistleblowing" (Tr. 73A, 85A, 149-50A, 163A, 168A, 186-87A, 199-201A, 203-04A). The coworkers (Tr. 127C; 150-54C) and the supervisors (RX 10; Tr. 48B) deny that they accused Hasan of "whistleblowing" or wanted him off the job site.

23. It appears from this record that no one at SERI or Bechtel knew Hasan had written letters to the NRC. (Tr. 141A; Tr. 48B; RX 10; Tr. 63C, 66C, 74C; 89C, 126C, 150C, 153C). They were aware, however, that Hasan discussed the warping torsion issue with the NRC at an audit in January of 1989, and that Hasan met with an NRC investigator in March 1989, during an audit which included, among other issues, pipe support stiffness. (Tr. 138B). On both occasions, Hasan was invited to meet with the NRC auditors by his SERI supervisors. (Tr. 65A, 130A).

25. The issues Hasan raised concerning pipe support stiffness and warping torsion and discussed in-house at SERI and during the NRC meetings are safety-related concerns which are presently under review by the NRC. (CX 3).

26. Although Hasan perceived that his supervisors and co-workers may have been angry or displeased by his discussions with them concerning the methods of calculating stiffness and warping torsion, Hasan's supervisors were satisfied with his work. (Tr. 221A; 30B). They recognized him as an expert in his field and accorded considerable respect to his opinions and judgments. (Tr. 42B, 72B, 80B). While Hasan and his supervisors did not always agree on matters of engineering judgment or methods of calculation, the SERI supervisors were receptive to his comments. (Tr. 31-32B), 74B). At times, Hasan's recommendations were adopted, at times they were rejected, (Tr. 152A; 36B, 42B, 72B, 78B) but no retaliation or harassment against Hasan is evident in either case. Indeed, his supervisors were under the impression that Hasan's concerns were resolved following their discussions. (Tr. 70B, RX 10, Tr. 90C).

Subsequent to discussions during which Hasan believed his supervisors were angry or upset with him, SERI extended his contracts so that he could remain at Grand Gulf. (RX 1-RX 5). In addition, in December of 1988, his SERI supervisors, Bob Gordon and Nyan Deshpande concurred with Bechtel's performance evaluation of Hasan for the period of June through December, 1988. On this occasion, Hasan was given "a very good review." (RX 7, Tr. 86-87C;

[Page 10]

30B).

27. Hasan was released from the Grand Gulf job site at the end of a refueling outage. The release was scheduled in accordance with management decisions concerning

manpower needs which were reviewed and planned in January and February of 1989. (See, Finding 20, *infra*).

Discussion

The Energy Reorganization Act of 1974, as amended, provides, in part, as follows:

- (a) No employer, including a Commission licensee, an applicant for a Commission License, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee...
 - (1) commenced, caused to be commenced,...a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended,
 - (2) testified or is about to testify in any such proceeding or;
 - (3) assisted or participated...in any manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954; as amended. 42 U.S.C. § 5851 (1982).

It has been held that a discrimination claim under the Act must include proof that:

- (1) the party charged with discrimination is an employer subject to the Act;
- (2) the employee engaged in protected conduct;
- (3) the employer took some adverse action against the

[Page 11]

- employee and;
- (4) the protected conduct was the likely reason for the adverse action.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Dartey v. Zack Company of Chicago*, 82-ERA-2, (April 25, 1983); *Sherrod v. AAA Tire and Wheel*, 85-CAA-3, (November 23, 1987).²

I.

Employer/Employee Relationship

At the outset, SERI argues that it is not covered by the Act in this instance, because Syed Hasan was an employee of Bechtel not SERI. As the owner and operator of the Grand Gulf Nuclear Station, and an NRC licensee, SERI is an employer covered by the anti-discrimination proscriptions of the Act. *Mackowiak, supra* at 1162. Further, Hasan, although technically employed by Bechtel Power Corporation, was an employee of SERI within the meaning of the Act.³

The record shows the SERI, under contract with Bechtel, secures engineers and others known as temporary, seconded employees, to fill its labor needs on projects which exceed the manpower capacity or expertise of its in-house staff. Temporary, seconded employees work alongside Respondent's permanent and permanent, seconded employees, and receive their work assignments, direction, control, and supervision in the same manner as Respondent's regular employees. As a result, seconded employees share with regular employees equivalent, and in some instances, unique access to the type of safety-related information which the NRC seeks to obtain, and the disclosure of which the Act clearly intends to promote.

The record further shows that temporary, seconded engineers at Grand Gulf perform an important function in the design and construction of safety-related structures and equipment at the station. As such, it is consistent with the policy of encouraging maximum NRC oversight of nuclear power plant construction activity to afford temporary, seconded employees coverage under the Act. *See, Hill v. Tennessee Valley Authority*, 87-ERA-23 24 (May 24,

[Page 12]

1989); *O'Brien v. Stone and Webster Engineering Corp.*, 84-ERA-31, (ALJ Decision February 28, 1985); *Royce v. Bechtel Power Corp.*, 83-ERA-3 (ALJ Decision March 24, 1983). Indeed, the exclusion of an individual in Mr. Hasan's position would provide an incentive to replace covered workers with unprotected contract employees thereby reducing the risk of what some might regard as unwelcome communications with the NRC.

Consequently, although Section 5851 does not define the term "employee", a broad interpretation which protects temporary, seconded workers engaged in the design and construction of safety related structures in a nuclear power plant seems compatible with the legislative history of the Act, the overall statutory framework, and the actual manner in which temporary, seconded employees are used by SERI at Grand Gulf. *See, Hill, supra*. I, therefore, conclude that Hasan was an employee of SERI within the meaning of the ERA.

II.

Protected Activity

A.

Safety-Related Communications

SERI next contends that complainant did not engage in protected activity when he raised concerns to his supervisors about warping torsion and stiffness calculations

relating to the pipe supports for the ADHRS and elsewhere throughout Grand Gulf. Citing *Brown & Root Inc. v. Donovan*, 747 F.2d 1029 (5th Cir., 1984), and noting that this matter arises within the jurisdiction of the Fifth Circuit, the employer insists that such internal complaints do not constitute protected activity. The employer argues further that while Hasan's letters expressing concerns to the NRC may constitute protected activity, the employer was completely unaware of the letters at times pertinent to this proceeding. Therefore, the employer reasons, such communications could not be construed as the basis for failing to extend Hasan's contract.

The employer's assertion that *Brown & Root* precludes a finding that Hasan's communications were protected is without

[Page 13]

merit. Although the Secretary of Labor has consistently and respectfully declined to follow the *Brown & Root* decision,⁴ the question of coverage for purely internal communications is really not the issue here.

It is abundantly clear that Hasan not only discussed his concerns internally with his SERI supervisors and co-workers, he reiterated his concerns in letters addressed to the Chairman of the NRC, and in meetings with NRC auditors. These external communications providing safety-related information to the NRC were protected activities clearly cognizable under *Brown & Root*, wholly apart from any question regarding coverage for internal communications. See, *In Re Willy*, *supra* at 548; *English v. General Electric Co.*, 683 F. Supp. 1006, 1010 at fn.2 (E.D.N.C., 1988).

B.

Employer's Knowledge of
Protected Conduct

The employer also contends that it was unaware of the letters Hasan addressed to the NRC and, therefore, Hasan's contention that adverse action against him was predicated upon the letters cannot be sustained. The employer's perspective on this issue, however, is a bit too narrow.

While the record supports the notion that SERI was unaware of the letters Hasan had sent to the NRC, SERI was undeniably aware of Hasan's visits with NRC auditors, on site, in meetings which SERI management had invited him to attend. SERI not only was aware that warping torsion and pipe support flexibility or stiffness would be addressed in those meetings, Hasan's supervisors knew what Hasan's views were in respect to those issues. SERI moreover, had no reason to suspect that Hasan would be reluctant to communicate his opinions to the auditors. The employer was, indeed, aware of the protected conduct.⁵

III.

Adverse Action

Mr. Hasan may establish a *prima facie* case of discrimination

[Page 14]

upon the demonstration of a sequence or pattern of suspicious circumstances from which it reasonably may be inferred that adverse action was taken in retaliation against the protected activity. *Mackowiak, supra* at 1162; *See also, Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61, 63 (2nd Cir. 1982); *Brown & Root, Inc. v. Donovan* 747 F.2d 1029 (5th Cir. 1984). Moreover, the presence or absence of a retaliatory motive is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Ellis Fishel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040, 101 S. Ct. 1757, 68 L. Ed. 2d 237 (1981). *Mackowiak, supra* at 1162.

Mr. Hasan contends that he was protected against retaliatory non-renewals of his temporary assignment at Grand Gulf, and that SERI's failure to renew his contract after the outage constituted unlawful discrimination in violation of the Act. The employer does not dispute the contention that a retaliatory or discriminatory non-renewal is actionable, however, it denies that protected activity played any part in the decision to release Hasan at the end of the refueling outage.

A.

Employer Reaction to Safety-Related Communications

I have combed the record for evidence, both direct and circumstantial, which might tend to indicate that protected activity, in whole or in part, motivated SERI managers not to renew Hasan's assignment. *Consolidated Edison, supra* at 63; *Mackowiak, supra*, at 1161, *Ellis Fishel State Cancer Hospital supra*, at 565; *Deford v. Tennessee Valley Authority*, 81-ERA-1, Decision of the Secretary of Labor, 700 F.2d 281, (6th Cir. 1983); *DeFord v. Secretary of Labor*, 82-ERA-2 (April 25, 1983); *Dartey v. Zack Company of Chicago*, 82-ERA-2 (April 25, 1983). *See also, Hedden v. Cornam Inspection*, 82-ERA-3 (June 30, 1982); *O'Brien v. Stone and Webster Engineering Corp.*, 84-ERA-31 (ALJ Decision, February 28, 1985). The record shows that Hasan engaged in internal discussions concerning safety-related warping torsion and pipe support flexibility problems during virtually the entire time he was assigned to Grand Gulf.⁶

[Page 15]

Yet, Hasan's supervisors generally respected his expertise, and although not always in agreement with his recommendations, they were receptive to the dialogues he initiated. Indeed, his supervisor, Nyan Deshpande, recognized that Hasan's experience in the construction of nuclear facilities involved new technologies, and he credited Hasan with introducing some of those technologies at Grand Gulf. Although Hasan described his supervisors as upset and angry or resentful that he pursued his concerns, the record reveals that Hasan may have misunderstood their reactions. Despite his safety-related communications, Hasan's SERI supervisors were satisfied with his work.

Nor is it necessary to rely upon the hearing testimony of SERI witnesses alone to reach these conclusions. Objective evidence contemporaneous with Hasan's safety-related communications substantiates SERI's contention that Hasan's concerns were accepted as routine differences of opinion of a type which are common among engineers at Grand Gulf. Thus, in late August or early September, after Hasan had raised the warping torsion issue with Bob Gordon and Nyan Deshpande, and after he had submitted the August 23, 1988, memo to Dr. Dubey, and at a time when Hasan's co-worker, Derick Hunter, had already departed Grand Gulf, SERI requested that Hasan remain on-site to work on another project. Indeed, Hasan was offered an assignment to "scope out" the designs of ladders and platforms in the facility after he had raised the torsion issue and met with Dubey.

The record further shows that SERI again extended Hasan's stay at Grand Gulf in December, 1988. This extension followed Hasan's continued communications about warping torsion, including a letter he had written to the Chairman of the NRC,⁷ and his recognition of a new problem, which he brought to his supervisor's attention, concerning pipe support flexibility calculations. During this same period, and notwithstanding his safety-related concerns, Hasan's SERI supervisors assigned him to assist in preparations for an NRC audit of the ADHRS pipe support system scheduled for January of 1989, and then concurred in a highly favorable job performance evaluation for Hasan. Contrary to Complainant's contentions, these actions seem incompatible with the notion that SERI management was angered by Hasan's initiatives.

Furthermore, in January, 1989, Hasan's supervisors invited

[Page 16]

him to participate in a meeting with the NRC auditors. Later, they asked him to review pipe support packages in response to the auditors' findings. Mr. Deshpande, therefore, assigned him to precisely the same types of tasks which led Hasan to raise safety issues in the first instance; the review of pipe support packages. Rather than redirect Hasan away from areas which Hasan believed angered and upset his supervisor, these assignments tend to reflect confidence in, rather than hostility toward or concern about, Hasan.

In December, February, and March of 1989, Complainant again wrote to the Chairman of the NRC raising the safety concerns he had previously discussed with SERI

management. In March, 1989, Hasan was advised by Deshpande that the NRC was returning for a second audit and would be delving into the pipe support flexibility issue. Deshpande noted that Hasan had previously raised this issue, was obviously familiar with it, and, accordingly, he selected Hasan to meet privately with the NRC auditor. Under these circumstances, I find it difficult to conclude that Deshpande, having the option to assign any engineer in his shop to meet with the NRC, would have sent Hasan to this private meeting if he or SERI management was angered or upset by Hasan's previous discussions.

Nor do I find credible Hasan's assertions that Deshpande threatened to fire him. following the meeting. Deshpande knew that he and Hasan had differences of opinion when Deshpande assigned him to meet with the auditor. Hasan and the auditor then met in private on a confidential basis. Although Deshpande had no way of knowing precisely what transpired in the meeting, he had every reason to anticipate that the views Hasan would convey to the auditors would be the same as those he had previously expressed in-house. If Deshpande wished to suppress those opinions, it seems unlikely that he would have picked Hasan to represent SERI at this NRC audit.

Moreover, the contract extension Hasan received in January of 1989, was set to expire within 10 days of the March audit. Yet, rather than release or fire Hasan, SERI again extended his contract through April 28, 1989. This extension was intended to carry Hasan through the refueling outage, and was entirely consistent with the manpower plan SERI developed in January and February of 1989 to support maintenance work scheduled during the outage.

[Page 17]

In summary, the record reveals that during the time Hasan was voicing his opinions regarding warping torsion and pipe support flexibility calculations, SERI renewed his contracts three times, concurred in a highly favorable performance review for Hasan, assigned him the task of preparing for NRC audit reviews, invited him to participate in two NRC audits, the second of which involved a private meeting with the NRC auditor, and asked Hasan to work on the pipe support calculations required by the NRC following the first audit. The record fails to reveal either a pattern of hostility or an incident credibly indicative of any likelihood that Hasan's release in April of 1989 was in retaliation for protected activities.

B.

Other Indicia of Potentially Discriminatory Adverse Action

There are, of course, other circumstances which might tend to raise an inference that Hasan's release was motivated in response to protected activity and they have been examined. Hasan, for example, emphasizes that in light of the short-term nature of a

temporary, seconded employee's assignment, the release itself, without more, may be a retaliatory act, and that, at a minimum, Respondent displayed a "dual motive" for his release. *See, Palmer v. Western Truck Manpower*, 85-STA-6, January 11, 1987).

Yet, under the circumstances revealed in this record, a "dual motive" analysis is unnecessary. It has been held that such a review is required only under circumstances in which the adverse action was motivated by two reasons, one legitimate and one prohibited. *Francis v. Bogan*, *supra* at fn. 1. In this instance, the record reveals that the employer's only motive for the release was legitimate.

In assessing the employer's motives, the history of Hasan's relationship with his supervisor's at SERI has been carefully considered. From the evidence concerning the employment relationship over time, I have found no indication that protected activity motivated Hasan's release.⁸

Moreover, in a broader context, the evidence fails to reveal that Hasan was subjected to disparate treatment in comparison with other similarly situated temporary, seconded

[Page 18]

engineers. (e.g., Stone & Webster Engineering, *supra*.) The co-worker with whom Hasan arrived on site was released prior to Hasan's first extension at Grand Gulf. Thereafter, temporary, seconded engineers, from time to time retained by SERI to work in the pipe support group, were all released by the end of the outage in April of 1989.⁹

Hasan argues further that he had, at the time of his release, a substantial amount of work to perform on the ladders and platforms project. The record shows, however, that Hasan, in early March, knew his assignment was coming to a close, and he was actively seeking a reassignment through Bechtel.

Hasan had, in the fall of 1988, been assigned to "scope out" the project. Both SERI management and Hasan knew, by December of 1988, that this was a massive undertaking. As a consequence, SERI determined that the project was too large to assign to its staff, and the decision was made to contract it out. By April of 1989, when Deshpande asked Hasan to return his files prior to his release date, the ladders and platforms project was no longer an in-house project at Grand Gulf.

I am, again, mindful of complainant's argument that the mere presence of protected activity by temporary employees establishes a *prima facie* case, and necessitates a "dual motive" analysis upon their scheduled release from a temporary job site. Yet, even if one accepts the general proposition which Complainant advances, it does not alter the outcome in this case. The record here clearly establishes that SERI would have released Hasan even if he had not engaged in protected activity. (*See, Findings 19, 20, 23, 24, 30*). *Palmer v. Western Truck Manpower*, 85-STA-6 (January 11, 1987).

Conclusions

Upon consideration of the record viewed in its entirety, I conclude that there is a lack of credible evidence in this record that Hasan was subjected to any hostile, discriminatory or retaliatory treatment by SERI supervisors during his assignment at Grand Gulf. I further conclude that Hasan's scheduled release from Grand Gulf was based solely on legitimate business considerations and was planned in the ordinary course of business as part of a routine staffing review to coincide with SERI's diminished manpower needs at the end of the refueling outage in

[Page 19]

April of 1989.

It is further concluded that Hasan's release from Grand Gulf was not, in any way, related to or, in part, motivated in response to his protected activity. He was not subjected to any dissaparate treatment vis a vis similarly situated temporary, seconded workers, and the reasons for his release were not pretextual. Under these circumstances, I conclude that SERI did not release or otherwise discriminate against complainant within the meaning of the Act. *See, Mackowiak v. University Nuclear Systems, supra; DeFord v. Secretary of Labor, supra.* Accordingly,

ORDER

IT IS ORDERED that the complaint filed by Syed M.A. Hasan be, and it hereby is, DISMISSED.

STUART A. LEVIN Administrative Law Judge

SAL:jeh
AUG 2 1989

[ENDNOTES]

¹Citations to the transcript of the proceedings on June 22, 1989, shall be identified by the page number followed by an "A"; the June 23, 1989, transcript shall be identified with a "B"; and the July 6, 1989, transcript shall be identified with a "C". The final transcript was received and the record closed on July 11, 1989. Thereafter, Complainant's Motion for Default Judgment dated July 6, 1989, together with Complainant's additional pleadings filed on July 11, and July 14, 1989, and SERI's responses filed on July 10, July 14, and July 17, 1989 were considered. Since Complainant's Motion for Default Judgment was a potentially dispositive pleading, it was addressed prior to, and thus marginally delayed, the issuance of this decision on the merits. Complainant's Motion was denied by Order issued on July 27, 1989.

² Respondent contends that the complaint was not timely filed. This contention is without merit. The time for filing does not commence to run when employee engages in protected activity but rather when the employee believes that adverse action was taken in retaliation against him for engaging in the protected activity. In this instance, Hasan's complaint was dated April 11, 1989, and was received on April 24, 1989, within 30 days of the date in early April when Hasan was assured that his request to remain at SERI was denied, and he believed the denial was in retaliation for his protected activities. 29 CFR § 24.3(a).

³ It may here be noted that Complainant does not allege that SERI, in any way, interfered with his employment relationship with Bechtel. (Tr. 97C-105C).

⁴ *Mackowiak v. University Nuclear Systems, Inc.*, 82-ERA-8 (April 29, 1983), *Wells v. Kansas Gas & Electric Co.*, 83-ERA-12 (June 14, 1984); *Richter v. Baldwin Associates*, 84-ERA-9 (March 12, 1986); *Willy v. The Coastal Corp.*, 85-CAA-1 (June 4, 1987); *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1 (April 27, 1987); *Smith v. Norco Technical Services*, 85-ERA-17 (October 2, 1987); *Nunn v. Duke Power Co.*, 84-ERA-27 (Deputy Secretary Decision, July 30, 1987); *Wilson v. Bechtel Construction, Inc.*, 86-ERA-34 (January 9, 1988).

The Fifth Circuit has noted the Department's position, *See, In Re Willy*, 831 F.2d 545, 548 (5th Cir. 1987), and the fact that other circuit courts have disagreed with *Brown & Root. Consolidated Edison v. Donovan*, 673 F.2d 61 (2nd Cir. 1982); *Mackowiak v. University Nuclear Systems, supra*; *Kansas Gas & Electric Co. v. Brock*, 880 F.2d 1505, 1513 (10th Cir., 1985). Subsequently, however, in *Willy v. Coastal Corp.*, 855 F.2d 1160, 1169 at fn. 13 (5th Cir., 1988), the court signaled that *Brown & Root* remains vital within its jurisdiction.

⁵ It seems fairly well settled that evidence demonstrating the employer's awareness of the protected conduct is a required element of the complainant's *prima facie* case. *See, Dartey v. Zack Company of Chicago, supra*; and *Sherrod v. AAA Tire & Wheel, supra*. *See, Lopez v. West Texas Utilities*, 86-ERA-25 (July 26, 1988. In *Francis v. Bogen, Inc.*, 86-ERA-8 (April 1, 1988), however, the Secretary noted that "It is unnecessary to decide whether such knowledge is required to establish a violation of the ERA..." In *Francis*, internal complaints to the employer were sufficient to establish the required "knowledge". The need to establish awareness of the external protected activity was the issue left undecided in *Francis*.

In a Fifth Circuit case in which the employer had no knowledge of the external complaints, the "internal complaints" notice theory relied upon in *Francis* might conflict with *Brown and Root*. There is no conflict in this instance, however, since the employer, as noted above, was aware of at least a portion of Hasan's protected activity if not the full scope of his NRC contact.

⁶ As noted previously, the Department of Labor has consistently held that such internal communications constitute protected activity, and, for purposes of this discussion, I have considered them as such, alone, and in the context of whether such communications may

fit into a pattern of circumstantial evidence indicative of a retaliatory action or motive. Accordingly, whether *Brown and Root, supra* or the Department's decision in *Willy, supra*, is applied, the outcome here does not change.

⁷In the Findings Of Fact, it is observed that there is no evidence that SERI was aware of this letter or others Hasan addressed to the Chairman. They are mentioned in this discussion to place them in a chronological context.

⁸To the extent that any of Hasan's co-workers may have resented him or expressed animus toward him, I find no indication that SERI management either shared such views of Hasan or retaliated against him in anyway.

⁹Complainant relies on *Priest v. Baldwin Associates*, 84-ERA-30, (June 11, 1986), in support of his contention that the mere release of a worker engaged in protected activity is alone sufficient to establish the adverse action. *Priest*, however, is distinguishable from the situation here in that Priest appears to have been a permanent Baldwin employee, not a temporary employee on specific assignment with a previously established release date. It should also be noted that in *Priest*, the employee not only was subjected to disparate treatment, the Secretary specifically concluded that the alleged reason for the employee's termination was mere pretext.